IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT PIKEVILLE

ARNETIA JOYCE ROBINSON, Plaintiff, vs. THE FEDERAL HOUSING FINANCE AGENCY, et al. Defendants.	:	CASE NO:7:15-cv-00109-ART-EBA **MOTION FOR LEAVE TO FILE MEMORANDUM ADDRESSING COURT'S DISCLOSURE**

Plaintiff Arnetia Joyce Robinson hereby moves the Court for leave to file a brief memorandum (attached hereto) addressing the Court's disclosure in its Order dated July 7, 2016 (D.E. 55).

Respectfully submitted,

/s/ Robert B. Craig

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

A copy of the foregoing Motion was filed using the Court's ECF system this 8th day of July, 2016, which will serve all counsel of record.

/s/ Robert B. Craig

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT PIKEVILLE

ARNETIA JOYCE ROBINSON, Plaintiff, vs. THE FEDERAL HOUSING FINANCE AGENCY, et al. Defendants.	:	CASE NO:7:15-cv-00109-ART-EBA **MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE MEMORANDUM ADDRESSING COURT'S DISCLOSURE**

On July 7, 2016, the Court entered its Order disclosing an oversight of the Court's ownership of 16 shares of stock in Fannie Mae, which is under the conservatorship of Defendant Federal Housing Finance Agency. Plaintiff requests leave to file the attached memorandum to briefly address the matter, and submits that the memorandum will be helpful to the Court's consideration of any issues raised by the disclosure.

Wherefore, Plaintiff requests leave to file the memorandum attached hereto as Exhibit 1.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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SOUTHERN DIVISION AT PIKEVILLE

ARNETIA JOYCE ROBINSON, *Plaintiff*, v. FEDERAL HOUSING FINANCE AGENCY, *et al.*, *Defendants.*	Civil Action No. 7:15-cv-109-ART

PLAINTIFF'S BRIEF REGARDING COURT'S
OWNERSHIP OF 16 SHARES OF FANNIE MAE STOCK

Whether the Court is required to recuse itself from this matter is governed by 28 U.S.C. § 455. A Court should *not* recuse itself if it is not required to do so, and the Court is not required to recuse itself in this instance. Indeed, "[t]here is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *Easley v. Univ. of Mich. Bd. Of Regents*, 853 F.2d 1351, 1356 (6th Cir. 1988); *accord In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988). Under the terms of Section 455, the Court can cure the recently identified conflict and continue presiding over this matter by divesting itself of its 16 shares of Fannie Mae stock. Plaintiff respectfully urges the Court to do so in light of the substantial time that has been spent preparing for next week's argument and the delay and inefficiencies that would be caused by the reassignment of this matter.

1. Subsection (b)(4) of Section 455 provides for recusal when the judge "*knows* that he . . . has a financial interest in the subject matter in controversy or in a party to the proceeding," "however small." 28 U.S.C. § 455(b)(4), (d)(4) (emphasis added). Because this provision includes a scienter element, *see Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S.

847, 859 (1988), Section 455 did not apply before the Court's recent discovery concerning the oversight relating to its ownership of 16 shares of Fannie Mae stock. And it will cease to apply if the Court divests itself of its shares. *See In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 70, 80–91 (S.D.N.Y. 2001), *mandamus denied*, 294 F.3d 297 (2d Cir. 2002). As Judge Posner reasoned in similar circumstances:

> [T]he purpose [of the statute] is just to make sure that judges do not sit in cases in which they have a financial interest, however small. Judge Getzendanner has no financial interest in this case. If she were to rule in favor of the plaintiffs it could not put a nickel in her pocket, because neither she nor her husband own securities of any member of the plaintiff class. Before she discovered she had a financial interest, she could have had no incentive to favor the plaintiffs; when she knew she had such an interest, she made no rulings in the case; now, when she has no interest, she cannot enrich herself by favoring the plaintiffs. The statutory purpose would not be served by forcing her to recuse herself. It is no surprise that the legislative history contains no indication that Congress would have wanted a judge to recuse himself in such a case.

Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 714 (7th Cir. 1986).[1] Divestment thus would cure the recently discovered conflict under subsection (b)(4).

2. In addition to curing any issue under subsection (b)(4), divestment also would cure any issue under subsection (a), which provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Given the minuscule nature of the Court's ownership of Fannie Mae stock and the prompt attention the Court has given to this issue, the Court's impartiality could not reasonably be questioned if it promptly sold its stock. Furthermore, disqualification under subsection (a) can be waived by the

[1] The Fifth Circuit has disagreed with *Union Carbide* and indicated that divestment will not be effective unless the requirements of subsection (f) are met. *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1031 (5th Cir. 1998). (Subsection (f) was enacted after the *Union Carbide* decision.) Plaintiff submits that this Court should follow the Seventh Circuit's reasoning rather than the Fifth Circuit's. At any rate, as explained below the requirements of subsection (f) are met here so divestment would be appropriate under either approach.

parties, *see* 28 U.S.C. § 455(e), and Plaintiff would agree to a waiver if the Court determined that the subsection applied here.

3. Divestment also is appropriate under the terms of subsection (f). It provides that:

> Notwithstanding the preceding provisions of this section, if any . . . judge . . . to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him . . . , that he . . . has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the . . . judge . . . divests himself . . . of the interest that provides the grounds for the disqualification.

The elements of subsection (f) would be met if the Court sold its Fannie Mae stock.

After substantial judicial time has been devoted to the matter. The Court, of course, knows whether it has devoted substantial judicial time to this matter. Plaintiff suspects that it has, as the Court not only has ruled on the stay motion that was filed earlier in this case but also likely has spent substantial time preparing for next week's argument and putting itself in a position to decide the motions to dismiss shortly thereafter, as it indicated it would in its order on the stay motion. *See* Order at 4–5 (Apr. 21, 2016), Doc. 45. Courts have held that substantial time preparing for argument satisfies subsection (f)'s "substantial judicial time" element. *See Stern v. Gambello*, 678 F.3d 797, 798 (9th Cir. 2012) (Berzon, J., in chambers); *In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 136, 141 (2d Cir. 2007).

Financial interest in a party. Although Fannie Mae is not a named party in this action, Defendant FHFA is conservator for Fannie Mae. In these circumstances, where the named party controls the party in which the Court has a financial interest as its conservator, this element of subsection (f) has been met.[2] Indeed, the statute defines "financial interest" to include not only a

[2] For example, courts have found that divestment cured a conflict under subsection (f) when a judge owned stock not in a party but in a party's corporate parent. *E.g.*, *Kidder, Peabody*

"legal . . . interest" but also an "equitable interest." 28 U.S.C. § 455(d)(4). Fannie and Freddie shareholders have both a legal and an equitable interest in the trust maintained by FHFA. *Cf. DeKalb County v. Federal Housing Finance Agency*, 741 F.3d 795, 798 (7th Cir. 2013) ("[A] conservator, like a trustee in a reorganization under Chapter 11 of the Bankruptcy Code, tries to return the bankrupt to solvency rather than liquidating it."). What is more, subsection (f) has been broadly interpreted to allow divestment of an otherwise disqualifying financial interest in a party *or* in the subject matter in controversy. *See In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d at 141.

Other than an interest that could be substantially affected by the outcome. The Court's 16 shares of Fannie Mae stock—valued at approximately $32[3]—is precisely the type of interest Congress meant to address in enacting subsection (f). "The House committee report cited as an example a judge's discovery that his wife owned *$30 of stock* that would disqualify him from a six-year old class action." *Mead Johnson Co.*, 1999 WL 778592, at *4 (emphasis added). This element plainly is met here.

* * *

Given the substantial time and resources that have been spent litigating the motions to dismiss that are set to be argued next week and decided shortly thereafter and the delay that would be caused by recusal, Plaintiff respectfully requests that the Court divest its interest in Fannie Mae stock to allow this case to move forward expeditiously and without interruption.

& Co. v. Maxus Energy Corp., 925 F.2d 556, 561 (2d Cir.1991); *Mead Johnson Co. v. Abbott Labs.*, 1999 WL 778592, at *2–*3 (S.D. Ind. Feb. 22, 1999).

[3] *See Federal National Mortgage Association (FNMA) Stock Updates*, YAHOO, http://goo.gl/eA3lln.

Respectfully submitted,

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 8th day of July, 2016, via the Court's Electronic Case Filing system.

/s/ Robert B. Craig

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT PIKEVILLE

ARNETIA JOYCE ROBINSON, Plaintiff, vs. THE FEDERAL HOUSING FINANCE AGENCY, et al. Defendants.	: : : : : : : : : : :	CASE NO:7:15-cv-00109-ART-EBA **ORDER**

This matter is before the Court upon the motion of Plaintiff Arnetia Joyce Robinson for leave to file her Brief Regarding Court's Ownership of 16 Shares of Fannie Mae Stock. The Court, being sufficiently advised, it is here ORDERED that said Motion is hereby GRANTED and the Clerk is directed to file the Brief in this matter.